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No. 10-1201

IN THE

Supreme Court of the United States

MARICOPA COUNTY SHERIFF'S DEPARTMENT, *et al.*,
Petitioners,

v.

CHARLES EDWARD BYRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Ninth Circuit erroneously held that the Fourth Amendment was violated as a matter of law when a female detention officer cadet pat-searched male inmate Mr. Byrd over his jail-issued boxer shorts, though the jury concluded the search was done appropriately, professionally, and with penological justification. The majority objected to the cross-gender aspect of the search, based on the type of clothing Mr. Byrd was wearing – jail-issued boxer shorts. The majority predicated its decision on the mercurial premise that the search would have been constitutional had Mr. Byrd been wearing different clothing.

The decision conflicts with federal precedent, which holds that the Constitution allows appropriately-conducted cross-gender pat searches over clothing. The decision also places improper emphasis on the thickness of the clothing the inmate is wearing. As the dissent noted, no matter how thick or thin the clothing is, "One has to apply enough pressure to contact the areas being searched, and to 'be able to feel something that's on the [area searched].'" Furthermore, the decision ignores the "wide-ranging deference" jail authorities must be accorded in deciding what policies are needed to maintain institutional security. Finally, it hamstrings all female law enforcement officers as they try to protect the public and safely perform their jobs, leaving them to worry about whether the material of an inmate's or arrestee's clothing is thick enough to allow them to conduct the search under the Fourth Amendment.

Respondent suggests that this Court's review is unnecessary because the question presented is "little more than a complaint that the court of appeals misapplied the correct rule of law." But this Court has often addressed – and reversed – circuit court decisions that incorrectly found searches unreasonable based upon a misapplication of the facts to settled Fourth Amendment precedent. This Court has not yet, however, addressed whether an otherwise constitutional, professionally-conducted, penologically-justified over-clothing pat search becomes unconstitutional simply because of its cross-gender aspect and the type of clothing worn by the inmate or suspect. Review is warranted because the ultimate determination of this issue will have widespread ramifications for law enforcement officers throughout the entire country.

1. Certiorari is appropriate. Respondent errs in arguing that certiorari is not appropriate because Fourth Amendment cases are fact-intensive, and this case involves "unusual facts."

a. First, if the fact-intensive nature of the analysis were enough to deny certiorari, then this Court would never address Fourth Amendment issues. Yet this Court has many times – and recently – reversed circuit court decisions that have misapplied the facts to "settled principles of law" when determining the reasonableness of a search under the Fourth Amendment. In *City of Ontario v. Quon*, __ U.S. __, 130 S. Ct. 2619, 2632 (2010), for example, this Court held not only that an employer's search of a police officer's on-the-job text messages was reasonable and did not violate the Fourth Amendment, but that the Ninth Circuit's holding to the contrary "was inconsistent with controlling precedents."[1]

That is exactly the case here. The Ninth Circuit's decision that this search was unreasonable as a matter of law is inconsistent with controlling precedent – as eight of the 14 judges who have con-

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[1] *See also L.A. County v. Rettele*, 550 U.S. 609 (2007) (search was not unreasonable, reversing Ninth Circuit); *Muehler v. Mena*, 544 U.S. 93 (2005) (officers' use of handcuffs to effectuate detention was not unreasonable under long-standing Fourth Amendment jurisprudence, reversing Ninth Circuit); *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (search of minivan at border not unreasonable; reversing Ninth Circuit; Court notes Ninth Circuit's approach "departs sharply from the teachings of these cases"); *United States v. Sokolow*, 490 U.S. 1, 3 (1989) ("A divided panel of the United States Court of Appeals for the Ninth Circuit held that the DEA agents did not have a reasonable suspicion to stop respondent, as required by the Fourth Amendment. . . We take the contrary view.").

sidered this issue agreed. Federal courts, and even the Ninth Circuit itself before this case, have uniformly held that the Constitution allows appropriately-conducted cross-gender pat searches over clothing. While the Constitution – and indeed Sheriff's Office policy – understandably does not allow a female officer to purposefully inspect the cavities and/or outside of a male's completely naked body or have the male lift his genitals and spread his buttocks for inspection, this case does not involve such a search. Never before has any federal court held that a professionally-conducted, penologically-justified pat search over clothing violated the Fourth Amendment simply because it was conducted by a female officer on a male inmate wearing boxer shorts. The issue begs for this Court's direction.

b. Second, the search here was not "unusual" or "unique" as Mr. Byrd posits. To the contrary, in fact, the jail commanders from more than half of Arizona's fifteen counties avowed in the Ninth Circuit that that court's en banc decision will adversely affect their jail operations. On these undisputed facts, the suggestion that this search was "uniquely intimate and intrusive" rings hollow. The commanders avowed that the Ninth Circuit's decision will force them to either prohibit female detention officers from conducting some of the regular duties of their assigned positions, or re-assign them away from positions they now hold, which in turn will impede the jails' ability to conduct necessary pat searches when required. This, they avowed, means that inmates and detainees might not be searched effectively or at all when necessary, leading to potentially deadly security risks for other detainees, inmates or staff.

Beyond the jail setting, as well, there is nothing unusual or unique about female law enforcement officers having to pat search male arrestees over whatever clothing the male happens to be wearing – even if it is nothing more than cotton shorts. Regardless of whether the search occurs in the jail or on the street, the search *must* include incidental contact (over the clothing) with the genital region to allow the officer to discover and remove hidden contraband, and thereby ensure the officers' and others' safety. As such, Mr. Byrd errs in suggesting that the search in this case was "uniquely intimate and intrusive." Like all pat searches, it was a 60-second pat check for contraband, not a drawn-out purposeful visual inspection of his genitals.

2. Mr. Byrd's facts are also wrong. First, he incorrectly states that the search was "conducted in a particularly discomforting and offensive manner." Actually, the jury found exactly the opposite.[2] Second, Deputy O'Connell did not "use[ ] her hand to lift Mr. Byrd's testicles and move[ ] them to the side" as he once again asserts. Not one witness testified so.[3] Deputy O'Connell specifically testified, "I'm not cupping [the scrotum], I'm not grabbing it, **and I'm not lifting it up** to look underneath it." (emphasis added). She testified that, keeping her fingers tightly together, her hand flat, and the thumb extended upward "to prevent the sensation of groping or

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[2] The jury clearly did not believe the testimony of Mr. Byrd, a five time felon (including convictions for forgery and identity theft), that Deputy O'Connell grabbed his penis, the shaft of his penis, his "whole testicles . . . everything."

[3] Mr. Byrd did not even testify so. To support the assertion, he cites only the en banc majority opinion, which also incorrectly stated that Deputy O'Connell searched "inside his anus."

anything of that nature," the back of her flat hand pushed the scrotum out of the way so that she could make sure there was nothing taped to or hidden in the groin, inner thigh, or perineum. Third, while Mr. Byrd states that the boxers "had an open slit and no buttons near the genital area," neither he nor anyone else even suggested at trial that Deputy O'Connell or anyone else saw his genitalia or that they were exposed.

Finally, Mr. Byrd's suggestion that "several male officers were available to perform the search" is misleading. The undisputed record demonstrates that more than half the counties in Arizona do not have sufficient manpower to conduct the kind of mass pat search conducted here without the assistance of female officers. Even in this particular search, although several male officers were in the room while SWAT was searching the cells and the cadets were searching the inmates, these supervising officers were doing their own jobs monitoring the searches and the 90+ inmates – who outnumbered the officers by at least two-to-one. *Byrd v. Maricopa County*, 629 F.3d 1135, 1154 (9th Cir. 2011). The record is silent on whether any one of them could have stopped what he was doing to perform a search on Mr. Byrd because Mr. Byrd did not utter one word of protest before or during the search, nor did he ask for a male officer or indicate he would have any problem being searched by a female officer.[4]

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[4] Other minor facts are also misstated. The detention officer cadets were not exactly "civilian clad" with no indication "they were affiliated with the jail system." All of the searching officers wore identical clothing – jeans and white t-shirts with their names emblazoned on the back. Nor was Deputy O'Connell "selected" to search Mr. Byrd as he states. Mr. Byrd simply

3. Mr. Byrd errs in suggesting that the Ninth Circuit's divergent outcome in this case is simply the "inevitable result" of a fact-based analysis. Federal cases discussing the cross-gender aspect of a search can indeed be generally categorized (putting aside the inapposite case where the *manner* of the search was inappropriate).[5] In one group are the cross-gender visual inspections of completely naked bodies. Though the Constitution allows female officers' occasional or casual sightings of naked male inmates,[6] the cases involving cross-gender visual inspections of completely naked bodies have either held that such allegations state a Fourth Amendment claim, or upheld jury verdicts finding such searches unreasonable. *See Moore v. Carwell*, 168 F.3d 234, 236-37 (5th Cir. 1999) (male inmate alleging he was subject to multiple strip and body cavity searches by female officer stated Fourth Amendment claim); *Hayes v. Marriott*, 70 F.3d 1144 (10th Cir. 1995) (male inmate's allegation he was subject to body cavity search in the presence of 100 people, including female secretaries and case managers, stated Fourth Amendment claim); *Canedy v. Boardman*, 16 F.3d 183, 186, 188 (7th Cir. 1994) (male inmate alleging female guards

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happened to be one of the dozens of inmates who walked out of the pod, and stopped in front of Deputy O'Connell to be searched.

[5] *E.g.*, *Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993) (addressing cross-gender searches where male officers were instructed to "squeeze and knead" the seams in female inmates' crotch areas and to "flatten" the breasts, though the prison knew such conduct re-victimized female inmates).

[6] *E.g.*, *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (female officers' monitoring of male prisoners during strip searches or on shower duty does not violate Fourth Amendment); *Oliver v. Scott*, 276 F.3d 736, 746-47 (5th Cir. 2002) (same).

strip searched him and "regularly see his naked body" stated a Fourth Amendment claim); *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (plaintiff's allegation that male inmates were subject to a "certain amount of viewing" by female guards "did not necessarily fall short of a cognizable constitutional claim"); *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981) (upholding jury verdict for female inmate where male guards forcefully removed her underwear). *See also Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991) (declining to decide the merits, but if female officers violated the Constitution by supervising a visual body cavity search of male inmate, officers nonetheless entitled to qualified immunity).

On the other hand, cases involving appropriately-conducted cross-gender pat searches over clothing have found those searches to be reasonable. *See Laing v. Guisto*, 92 Fed.Appx. 422 (9th Cir. 2004) ("We have repeatedly held that searches or surveillance of male prisoners by female guards does not violate the constitution."); *Rice v. King County*, 2000 U.S. App. LEXIS 29897 (9th Cir. 2000) ("In general, cross-gender pat-down searches of male inmates by female prison guards are constitutionally permissible."); *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990) (inmates' rights not violated when they were subject to short pat down searches by female guards; touching of genital and anal areas is brief and incidental); *Grummet v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) ("Similarly, routine pat-down searches, which include the groin area, and which are otherwise justified by security needs, do not violate the fourteenth amendment because a correctional officer of the opposite gender conducts such a search."); *Madyun v. Franzen*, 704 F.2d 954, 956-57 (7th Cir. 1983) (assuming officer ran her hands along pris-

oner's legs well above "mid-thigh" in the crotch area, search was constitutional, as no more "than a simple frisk or pat-down, done outside the clothing, without any deliberate attempt to examine 'genital-anal' areas."); *Smith v. Fairman*, 678 F.2d 52, 53 (7th Cir. 1982) ("By limiting the nature and scope of the search female guards are allowed to conduct on male inmates, it has sought to accommodate the right of women to equal employment opportunities with the male inmates' right to privacy."); *Guillory v. Snohomish County Jail*, 2007 U.S. Dist. LEXIS 51190 (W.D.Wash. 2007) ("a policy permitting female officers to conduct clothed pat-down searches of male inmates under appropriate circumstances is not an unconstitutional search and seizure on its face."); *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983) ("The only issue here is whether a reasonable and therefore constitutional search of a male inmate becomes unreasonable and therefore unconstitutional if it is performed by a woman. Clearly it does not."). *See also Martin v. Swift*, 781 F. Supp. 1250, 1253 (E.D. Mich. 1992) (policy allowing cross-gender pat searches is constitutional; to find otherwise would require every police car to carry two officers, one male and one female, so that misdemeanants would be searched by officers of the same sex). Contrary to Mr. Byrd's argument, the Ninth Circuit's decision conflicts with this long line of cases.

To rationalize its decision, the en banc majority called Mr. Byrd's search a "strip search," attempting to jam this round case into the square precedent prohibiting female officers from strip searching male inmates absent exigent circumstances. *Byrd*, 629 F.3d at 1146 ("This litany of cases over the last thirty years has a recurring theme: cross-gender strip searches in the absence of an emergency violate an

inmate's right under the Fourth Amendment to be free from unreasonable searches."). But this was not a strip search. It was not even a "partial strip search," as Respondent terms it. He was not naked, and Officer O'Connell did not conduct "a visual scan of the inmate's skin after all clothing has been removed." She did not visually inspect the cavities and/or outside of his completely naked body. She did not have Mr. Byrd lift his genitals or spread his buttocks for visual inspection as would be done in a strip search. Indeed, per Sheriff's Office policy, she would not have performed a strip search on a male inmate.[7]

That this was not a "strip search" is not a matter of terminology or semantics. The Sheriff's Office policy allowing female officers to pat search, but not strip search, male inmates strikes a careful and workable balance between the inmates' "extremely limited" privacy rights and the jail's need to preserve institutional security. Obviously, inmates sometimes try to hide contraband by taping it to the genital area. Nevertheless, female officers do not view or inspect naked male genitalia. They do not ask male inmates to lift their testicles to show whether anything is taped underneath. Officer O'Connell did

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[7] Nor did the Ninth Circuit's decision rest on the myriad facts listed in Respondent's brief (at pp. 14-15). The en banc majority itself stated, "If the search conducted were in fact a pat-down search of a partially clothed inmate, we would probably agree that the search was reasonable. However, because Byrd was subjected to a cross-gender strip search while nearly nude, we conclude that the search was patently unreasonable." Thus, the deciding factor in the constitutionality of the search was the fact that Mr. Byrd was wearing thin boxer shorts when the female officer searched him.

not look inside Mr. Byrd's shorts. She did not at any time see Mr. Byrd's genitalia. She performed a professional, appropriate, and justified 10- to 60-second pat search over his shorts. This is analytically no different from the over-clothing searches that federal precedent has for decades declared constitutional.

4. Finally, Petitioners are not insisting that "a reasonableness standard will leave correctional officers without guidance," as Mr. Byrd posits. Petitioners are insisting that the Ninth Circuit has once again misapplied that reasonableness standard in contravention of settled Fourth Amendment jurisprudence. Moreover, the implications of this misapplication are more far-reaching than Mr. Byrd recognizes. They are not limited to the jail setting, as Mr. Byrd seems to suggest. The safety of all female law enforcement officers demands that they must be able to conduct professional and appropriate pat searches over male arrestees' clothing, no matter what the arrestees are wearing. These officers simply cannot be left to wonder whether the Fourth Amendment would allow them to conduct the search if the arrestee is wearing cotton shorts instead of jeans, a bathing suit instead of cutoffs. The safety of the public, the country's detention and law enforcement officers, and even the inmates and suspects themselves, is far too important to risk with the uncertainty imposed by the Ninth Circuit's aberrant decision. Certiorari is warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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